No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

VS.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Strip away the strawmen, the record distortions and the mischaracterizations of the Seventh Circuit's opinion, and the essence of Monsanto's Petition raises not a legal contention, but the claim that the jury, the trial judge and the Seventh Circuit ignored what Monsanto claims are dispositive facts. Thus, the only question presented by the Petition is:

> Whether there was sufficient evidence to sustain the jury's findings regarding defendant's per se violations of Section 1 of the Sherman Act?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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BRIEF IN OPPOSITION[1]

COUNTERSTATEMENT OF THE CASE[2]

Summary of Proceedings Below

Respondent, Spray-Rite Service Corporation, filed its Complaint on February 24, 1972, amended in 1975, charging petitioner Monsanto Company with violations of Section 1 of the Sherman Act. (*See* Amended Complaint ¶ 11)

[1] Pursuant to Rule 28.1, Spray-Rite Service Corporation states that it is a closely-held corporation which does not have any parent companies, subsidiaries or affiliates.

[2] Although this Court's Rule 21 states that petitioner's statement of the case is to be "*concise*" and contain only the "facts" material to the questions presented, Monsanto's statement is neither concise nor factual. It is nothing more than arguments and contentions interspersed with record distortions.

An example is Monsanto's bald assertion that "[l]ike all manufacturers, Monsanto was interested in resale price levels in its markets." (Pet. at 6) There is no citation, of course, since there is no evidence whatsoever in the record regarding the "interests" of other manufacturers.

Trial commenced on January 14, 1980, and the jury returned a verdict for plaintiff in the untrebled amount of

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(footnote continued)

Another example is Monsanto's claim that there is no evidence that "any distributor agreed to follow Monsanto's suggested prices." (Pet. at 7) In fact, the evidence of such agreement is overwhelming. For example, when Spray-Rite attempted to purchase Monsanto products in the year after its termination, Associated Producers, a Monsanto distributor, quoted Spray-Rite the suggested price pursuant to "control" exerted by Emmett H. McCormick, then a Monsanto district manager. (Tr. 792, 1951, 1955) The following year when Spray-Rite approached distributor Laverty Sprayers and asked to buy Monsanto products at one-half cent per pound below suggested price, Laverty's general manager refused, because a "distributor in Missouri had reduced it a half cent a pound and he is no longer a distributor." (Tr. 865-66) Likewise, a Monsanto memorandum regarding its distributor presentation to distributor W. R. Grace stated:

> Presentation was well received and Mr. Chandler indicated he would comply with the requests we made. He will again handle all orders for this region and . . . maintain pricing control. . . .

PX 325. *See also* PX 35[illegible]. A final example is the October 1, 1968 newsletter of distributor Associated Producers, discussed *infra* at p. 9.

It would require more than the pages allotted for this brief to refute all of the record distortions in Monsanto's statement. But even more egregious are its repeated mischaracterizations of the Seventh Circuit's opinion. A typical example is Monsanto's claim that the Seventh Circuit "did not address whether respondent had proven an overall resale price maintenance conspiracy between Monsanto and its distributors." (Pet. at 3) Even a cursory examination of the opinion demonstrates that this claim is nonsense. (*See* App. at A16-17)

A more clever subterfuge is Monsanto's attempts to transform its contentions into Seventh Circuit findings. Monsanto therefore asserts that "[t]he court acknowledged that respondent 'was only able to show that Monsanto was concerned about the resale price of its herbicides and that it received some price complaints about [respondent] from other distributors.' " (Pet. at 8-9) Examination of the opinion demonstrates beyond peradventure that the Seventh Circuit did not so acknowledge and was instead restating a Monsanto claim. (App. at A14-15)

$3,500,000 on February 21, 1980. (Tr., Feb. 21, 1980, at 2) The jury also answered affirmatively the following special interrogatories requested by Monsanto:

> 1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto's herbicides? Answer: *Yes.*
>
> 2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides? Answer: *Yes.*
>
> 3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968? Answer: *Yes.*

(*Id.* at 2-3) (Emphasis added) The district court denied Monsanto's motions for a directed verdict new trial and judgment n.o.v. (App. at D1-2)[3]

On June 28, 1982, the Seventh Circuit unanimously affirmed. (684 F.2d 1226) On September 8, 1982, the Court of Appeals denied Monsanto's petition for rehearing with suggestion for rehearing *en banc.* (App. at E-1)

The Parties

A. Spray-Rite Service Corporation ("Spray-Rite")

Spray-Rite began distributing agricultural chemicals in 1955. (Tr. 509) In 1957 it became an authorized distributor

[3] The following abbreviations are used in this Brief: "Tr." (trial transcript); "PX" (plaintiff's exhibit); "DX" (defendant's exhibit); "Pet." (Monsanto's Petition for Certiorari); "App." (Appendix to Petition).

of Monsanto herbicides, and Monsanto sold directly to Spray-Rite from 1957 until its termination as a distributor in October of 1968. (PX 167; PX 174; PX 201; Tr. 1222-24) At the time of its termination, Spray-Rite had grown to be Monsanto's tenth largest distributor (out of approximately 100) and the eighth most proficient in meeting Monsanto's performance goals. (Tr. 1549-50; PX 426)

Dr. Ellery Knake, Professor of Weed Science at the University of Illinois, testified that Don Yapp, Spray-Rite's president, was innovative, imaginative and a pioneer in the application of herbicides. (Tr. 751) Spray-Rite was one of the few distributors selected by Monsanto to test its new products in 1965. (Tr. 603, 1500-01)

Spray-Rite made deliveries 24 hours a day, seven days a week. (Tr. 572, 907, 2127) Dr. Earl Hughes testified that Hughes Hybrids bought its herbicides from Spray-Rite because it was an innovator, "knew the business" and provided "very good service." (Tr 1234-35) John Case, owner of PAG of Naperville, testified that his company bought all of its Monsanto herbicides from Spray-Rite because it "was able to provide . . . product at a reasonable price, give us excellent service in season [and] provide us with the technical information to make sure our growers got the best results from the product. . . ." (Tr. 1710) Robert Tracey, Chairman of the Board of Tracey & Sons, stated that Spray-Rite "gave us great help in learning how to handle these herbicides," that his company depended on Spray-Rite for herbicide recommendations, and that he never had a supplier of herbicides who gave better service than Spray-Rite. (Tr. 898, 901-03, 906-07) As one retailer put it: "[A]s far as I was concerned he [Yapp] was Monsanto in Northern Illinois." (Tr. 1714)

B. Monsanto Company ("Monsanto")

During the relevant period Monsanto manufactured patented, proprietary herbicides.[4] (PX 139; Tr. 1605-06) Since Monsanto's herbicides, like those of other manufacturers, could only be used with certain crops to treat certain weeds, the successful herbicide distributor had to have a full line of herbicides from all manufacturers in order to service his customers' needs. (Tr. 571, 581-82, 681-82, 872, 1360, 1388, 3597)

Brief Summary of Conspiracy Evidence

A. Pre-termination

Spray-Rite was known by its customers, competitors and Monsanto as an aggressive price-cutter. (Tr. 614-16, 1375-79, 1392, 2394-96, 3200, 3573, 3662) Hopkins, one of Spray-Rite's major competitors, testified that Spray-Rite set the level of competition in pricing for southern Wisconsin and northern Illinois. (Tr. 1375-77) In 1968, the year of its termination, all of Spray-Rite's sales of Monsanto herbicides were below Monsanto's suggested prices. (Tr. 3178)

The complaints about Spray-Rite's prices, particularly from less efficient and less profitable competitors, were

[4] Monsanto's "Business Plan," written two years after Spray-Rite's termination, stated:

> B. Proprietorship.
>
> The rapid growth of the corn/soybean pre-emergent herbicide market has been due in large part to the development of a few highly selective compounds. These compounds are the patented property of a handful of large companies marketing agricultural chemicals. The proprietary nature of these compounds and their varying levels of activity and selectivity has [sic] resulted in a relatively stable market with respect to price.

PX 139.

legion. (Tr. 103-04, 107-11, 118, 122, 127-29, 1398, 3631, 3657-58; PX 185) David Stein, a Monsanto district manager, testified that complaints about Spray-Rite's pricing on Monsanto herbicides came from virtually everyone in the distribution system, and that both his superiors and "other distributors" complained about its prices. (Tr. 2396)

Philip James, Monsanto's sales representative in Spray-Rite's trade area of northern Illinois during 1964-65, testified that Spray-Rite was an aggressive price-cutter, that he had received complaints about Spray-Rite's prices from many of its competitors including Funk Bros., Farm Services, Thompson-Hayward and Remole Soil Service, and that he reported what happened in the field to Monsanto's main office in St. Louis. (Tr. 3631, 3657-59)

Michael Flynn, James' successor, testified that he received distributor complaints about Spray-Rite's pricing "at least 20 times" from American Oil, Farm Services, Funk Bros., C.D. Ford & Sons, Hub Oil, Cole Chemical, Bureau Service Company, Hopkins and FMC (Tr. 109-29). Flynn stated that Monsanto was concerned about the prices distributors were charging for Monsanto herbicides, and that St. Louis "wanted to know what the pricing was in the area." (Tr. 115-16)

Flynn testified that Spray-Rite published its prices in flyers distributed to dealers and farmers, and that he "sent one of them to St. Louis as, you know, what Spray-Rite was doing." (Tr. 117, 119) Spray-Rite was the subject of at least 25 of his call reports to St. Louis, and in "at least half" Flynn discussed complaints by named distributors regarding Spray-Rite's prices. (Tr. 120-21). Flynn also had conversations with various Monsanto personnel about Spray-Rite's prices, including James, Bill Butler, Bob Wilson and Dick Johnson. (Tr. 121-22) Spray-Rite's pricing was also

"brought . . . to the attention of product supervisors in the herbicide product group." (Tr. 122)

Flynn also testified that on "three or four" occasions he approached Don Yapp regarding Spray-Rite's prices. (Tr. 110-11, 114):

> I would go into Don and encourage him to maintain or to derive the profitability out of the product that was suggested to him. . . ."

Tr. 114. Flynn recalled one occasion where Farm Services, "a highly valued customer of Monsanto in the herbicide field," complained directly to St. Louis about Spray-Rite's prices. (Tr. 122-26) Flynn was told by St. Louis to "verify the complaint," which he did by going to Farm Services in Bloomington, Illinois. (Tr. 125) Armed then with information from Farm Services regarding the "specific areas where the pricing problems" by Spray-Rite were, Flynn went directly to Spray-Rite to "make the statement that we have received complaints." (Tr. 125)

In another instance, distributor James Hopkins complained about Spray-Rite's prices to Bob Wilson, a Monsanto salesman in Wisconsin, who in turn told Flynn to keep Spray-Rite out of Wisconsin. (Tr. 127-28) On May 7, 1967, Hopkins wrote Arvan, Monsanto's General Manager for Agricultural Chemicals, and complained that a distributor was unloading excess inventories at depressed prices—an activity that was "definitely not conducive to an orderly marketing structure." (PX 185)

Flynn also testified regarding a complaint about Spray-Rite he received from Garland Grace, a field salesman for distributor FMC. (Tr. 128-29) Grace complained that "he could not meet [Spray-Rite's] competition in terms of price," showed Flynn Spray-Rite's price flyers, and "wanted to know if I [Flynn] *could do anything about it.*" (Tr. 129) (Emphasis added)

In response to these distributor complaints and requests for action, Monsanto first threatened Spray-Rite and then carried out the threats by actual termination. (Tr. 615-20, 701-12, 767) In June or July of 1966, Bill Butler, Monsanto's district manager for Spray-Rite's trade area, telephoned Don Yapp and asked him to attend a meeting at the district office. (Tr. 615) Yapp met with Butler and Arvan, and both questioned Yapp regarding the prices Spray-Rite quoted for Monsanto's Ramrod to Meiers, Inc. (Lexington, Illinois) and other customers. Yapp testified:

> Mr. Arvan told me that we had better increase our prices, if we do not increase our prices we may lose our distributorship.

Tr. 619.

In January of 1967, Yapp received telephone calls from Bill Bone, Butler's successor as district manager, and Donald Fischer, who Yapp believed "was in charge of herbicides . . . at Monsanto, St. Louis." (Tr. 620-27) Both inquired regarding Spray-Rite's prices. (Tr. 626)

In the spring of 1968, Bone called Yapp and asked whether Spray-Rite was aware of Monsanto's suggested prices. (Tr. 701-04) Bone said that Spray-Rite was to sell at the suggested price, and if Spray-Rite did not know the prices, he would send a price list. (Tr. 702-03) Bone did send Spray-Rite a price list with the words "Dealer Price" underscored and a note that the list was from him. (Tr. 704; PX 202) Bone also told Yapp that if Spray-Rite did not follow the suggested prices, "retaliation was going to take place." (Tr. 711) Spray-Rite refused to raise its prices. (Tr. 712)

B. Termination

On October 28, 1968, Fischer informed Yapp that Monsanto had terminated Spray-Rite's herbicide distributor-

ship.[5] (Tr. 767) When Yapp went to St. Louis to plead for reconsideration because Spray-Rite needed Monsanto's products, the first thing Fischer told him was that Monsanto had received many complaints about Spray-Rite's prices. (Tr. 768, 774, 1295)[6]

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[5] James Sovocool, a Monsanto area supervisor, told McCormick that if Monsanto could get Spray-Rite and one other price-cutter "*squared away*, we could stabilize things around here." (Tr. 1946) (Emphasis added) Termination certainly "squared away" Spray-Rite (Tr. 2681), and by 1970 Monsanto was able to achieve what it described as a "relatively stable market with respect to price." (PX 139 at 4)

[6] The chilling effect of Spray-Rite's termination was immediately apparent. (PX 233) At the time Spray-Rite was being terminated, Monsanto was introducing Lasso, an improved product for which there would be immediate demand. (Tr. 1929) Monsanto therefore sought to stabilize Lasso's price in order to avoid losing dealer support (Tr. 1558, 1929, 1936-37). Its new program for the coming season was most aptly described by distributor Associated Producers in an October 1, 1968 newsletter:

> Monsanto, now recognizing the absolute necessity of getting the "market place in order" with regard to their entire line of agricultural chemicals, is determined to do what it takes to rectify the situation from now on.
>
> • • •
>
> [E]very effort will be made to maintain a minimum market price level.
>
> • • •
>
> In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as *the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons.* So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity.

PX 233 (Emphasis added).

C. Post-termination Boycott

Thomas Dille, Monsanto's district manager for Spray-Rite's trade area from December of 1968 until the end of 1971, testified that during this period he received Spray-Rite price flyers from Monsanto salesmen and in the mail. (Tr. 1735) He also stated that both he and his salesmen received "many" complaints from Monsanto distributors and dealers regarding Spray-Rite, and that he "probably" passed these complaints to St. Louis. (Tr. 1736, 1741-42) More specifically, Dille testified that the complainants inquired "what will you do," and that they asked whether Monsanto could cut off Spray-Rite's source of Monsanto products. (Tr. 1741-42) Dille also passed these inquiries to St. Louis. (Tr. 1741)

Flynn testified that "[i]n either the 1969 or the 1970 season, Monsanto became aware that Don Yapp did have some Monsanto product . . . ," and that Tom Dille asked him if he had "any information as to where Don Yapp did get this product." (Tr. 169) Flynn then called in some dealers and "in an indirect method attempted to determine where Don got his product." (*Id.*) At a subsequent meeting of sales representatives for the Muscatine district, "Tom Dille conveyed that he did not want Don Yapp to get any product." (Tr. 170-71)

McCormick testified that during the time he was a Monsanto district manager (fall of 1968 through October 1969), "we [at Monsanto] were trying to find out what he [Yapp] got his products for . . . , and who sold it to him." (Tr. 1949) The subject of who was selling Spray-Rite and at what price was specifically discussed at a district manager's meeting in St. Louis. (Tr. 1949) McCormick testified that on several occasions Monsanto's Schweikher asked Associated Producers whether it had sold Monsanto product to

Spray-Rite. (Tr. 1949, 1951) McCormick then admitted that he "told Fred Bailey [of Associated Producers] that he wasn't supposed to sell Don Yapp," and that his command was obeyed. (Tr. 1951) When asked the purpose of all this effort, McCormick flatly declared that the purpose was "to keep Don Yapp from tearing up the marketing." (Tr. 1950)

Monsanto also told John Mulvehill, president of Midstate Chemical Co., not to sell to Spray-Rite. (Tr. 274-75) In March of 1970 Mulvehill was in St. Louis and met with Stewart Daniels, Assistant General Manager of the Agricultural Division:

> And among other things, had a nice one-on-one session with Mr. Stew Daniels who . . . told me that I shall not sell Spray-Rite in Illinois. . . . I said, "What's going to happen if I do?" He said, "You know what's going to happen." "You mean I may not be selling next year?" He said, "You get the idea."

Tr. 274-75.

In the fall of 1970, following the Daniels conversation, Yapp called Mulvehill and offered to buy Monsanto herbicides. (Tr. 290, 858-62) Mulvehill testified: "I immediately got sort of a little sick feeling in my stomach because I knew I couldn't sell him or didn't think I was going to be able to do it and get away with it." (Tr. 290-91) Mulvehill stalled until he could meet with Albertson, Monsanto's district manager:

> And either the Friday or the Thursday before the closing date of that order, Max [Albertson] was in fact in my office and I did ask him if I could make that sale to Don Yapp. I said, "I have it in hand here. He's called. He'd done everything possible to buy this stuff from me," and he said, "No, don't make that sale. He's [illegible]ody that we don't want you to sell to. And besid[illegible]'s out of your territory."

Tr. 292. Mulvehill declined the sale even though Spray-Rite offered to raise the purchase price. (Tr. 293-295) Mulvehill explained his reasoning in trying to "play their game":

> If I had not had the fear of getting in trouble with Monsanto, I would have done it.

Tr. 295.

REASONS FOR DENIAL OF THE WRIT

Monsanto's Petition is nothing more than a jury argument on carefully selected facts believed helpful to it. That stage of the case is long past, and such reargument is clearly inappropriate in this Court. The jury decided that Spray-Rite's facts (not "allegations") overcame Monsanto's claims, and both the district court and the Seventh Circuit agreed. As Mr. Justice Holmes declared in *United States* v. *Johnson*, 268 U.S. 220, 227 (1925):

> We do not grant a certiorari to review evidence and discuss specific facts.

Moreover, the Court this term denied *certiorari* in *Schwimmer* v. *Sony Corp of America* and *Venture Technology, Inc.* v. *National Fuel Gas Distrib. Corp.*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982) (Nos. 82-277, 82-362) (White, J., dissenting), in which the writs were sought on the basis of asserted conflict between these Second Circuit decisions and the Seventh Circuit's decision here. Monsanto presents the same point, but with even less merit, since it virtually admits that the jury was correct in finding a post-termination conspiracy to boycott Spray-Rite. Pet. at n.4. It strains credibility to believe that the *coup de grace* of the boycott was the beginning rather than the culmination of the price-fixing conspiracy.

By the same token, the presence of this boycott conspiracy sets this case apart from all of the cases relied upon by Monsanto. It overrides any conflict in the circuits which

Justice White perceived and colors all of Monsanto's actions.[7]

I. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS IN REVIEWING THE TRIAL EVIDENCE AND JURY VERDICT

In reviewing the trial evidence and jury verdict, the Seventh Circuit held that it "must weigh conflicting evidence and inferences most favorably to the prevailing party," and that it must affirm "[i]f there is any substantial evidence in the record to support the jury's verdict." App. at A-14. These appellate standards comport with the decisions of this Court. *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943).

II. PETITIONER'S POINT I DISTORTS THE SEVENTH CIRCUIT'S HOLDING AND IS NOTHING MORE THAN A REARGUMENT OF THE SUFFICIENCY OF THE EVIDENCE

When the history of petitioner's Point I is examined, it is apparent that Monsanto has distorted the Seventh Circuit's holding and changed its theory in an attempt to obscure an inopportune reargument of the sufficiency of the evidence.

Monsanto did not object to the following trial court instruction:

> It is also per se illegal for a manufacturer to utilize customer or territorial restrictions pursuant to or as a part of, a comprehensive price-fixing plan or an agreed refusal to deal. Therefore, if you find that the defendant conspired or combined with one or more of its distrib-

[7] *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.")

> utors to utilize the defendant's customer or territorial restraints in order to effectuate price stabilization or resale price maintenance, or to detect and prevent resale price-cutting, or to effectuate any restriction on plaintiff's access to defendant's products, then the defendant has violated Section 1 of the Sherman Act.

Tr. 4356. In fact, Monsanto's counsel (1) specifically suggested the phrase "pursuant to" (Tr. 4055: "I just think 'pursuant to' is the law."); (2) conceded that it is per se illegal to use customer and territorial restraints pursuant to a price-fixing conspiracy (Tr. 4054: "I would say it is also per se illegal for a manufacturer to utilize customer *or* territorial restrictions pursuant to a price-fixing conspiracy or agreement." (Emphasis added)); (3) suggested that "ancillary to" and "pursuant to" are interchangeable (Tr. 4056: 'I think when the seventh circuit has spoken of ancillary to, it means the same thing as pursuant to.") and (4) flatly admitted "that if you conspire to use restraints with distributors to effectuate price-fixing it is illegal." (Tr. 4058)[8] The jury, in answering Special Interrogatory No. 2, specifically found that Monsanto's programs and policies were part of a price-fixing conspiracy.

On appeal, Monsanto flatly argued that "programs and policies such as Monsanto's cannot be *per se* violations." Br.

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[8] As observed by the Seventh Circuit (App. at A-11 n.5), the trial court also included the following instructions requested by Monsanto regarding this issue:

> The fact that a program may have an effect on prices, even raising them, does not mean that it is part of a price-fixing plan. Imposing normal competitive requirements on a distributor, such as encouraging a distributor to advertise, may affect the distributor's costs, thereby indirectly affecting the price at which the distributor will sell the product. That does not necessarily mean that those requirements are part of a price-fixing conspiracy or combination, although you may find that they are part of a conspiracy or combination.

at 29. The Seventh Circuit, despite having before it Spray-Rite's claim that Monsanto had waived any objection to the trial court's instruction, passed over the waiver question and decided the issue on the merits. It is critical to note that the Seventh Circuit's discussion of this issue appears in the section of the opinion dealing with Monsanto's challenges to the trial court's instructions (App. at A5-13) and not in the section on Monsanto's claims regarding the sufficiency of the evidence. App. at A-13 *et seq.* The court of appeals described Monsanto's argument as follows:

> Monsanto contends that the instructions concerning Monsanto's compensation programs and shipping polices were erroneous. The court instructed the jury that it is per se unlawful for a manufacturer to utilize customer or territorial restrictions as part of a comprehensive price-fixing plan or boycott. Monsanto claims that the court should have instructed the jury to determine the lawfulness of its compensation programs and shipping policies pursuant to the rule of reason rather than the per se rule.

(footnote continued)

> Defendant has the right to assign distributors to areas of primary responsibility and to assign points where distributors can pick up products or take delivery, so long as the decision to do these things is independent and not because of a price-fixing conspiracy or combination.
>
> • • •
>
> The fact that some of Monsanto's policies may have affected the price paid by all non-contract sellers, including plaintiff, does not necessarily establish a conspiracy, but may be evidence which you can consider along with all the other evidence in the case in deciding whether a conspiracy existed.
>
> Defendant has the right to implement incentive programs in order to encourage its distributor to perform certain marketing functions unless those programs are part of a price-fixing conspiracy or combination.

Tr. 4364-65.

App. at A11-12. The Seventh Circuit then stated that Monsanto's reliance on *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) was misplaced, and held that this instruction issue was governed by this Court's decisions in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), *White Motor Co.* v. *United States*, 372 U.S. 253, 260 (1963) and *United States* v. *General Motors Corp.*, 384 U.S. 127, 142 (1966). The appellate court found that the trial court's instruction on this issue was accurate, and it distinguished cases cited by Monsanto where either the plaintiff "failed to allege that the distributors' territorial restrictions were ancillary to a per se unlawful price-fixing scheme," or "plaintiff had failed to prove the existence of a price-fixing conspiracy." App. at A-13 n.6.[9] Therefore, a fair reading of the Seventh Circuit's holding on this *jury instruction issue* is simply that it is proper for the trial court to give a per se instruction if, and only if, a per se violation is properly alleged in plaintiff's complaint and there is enough evidence or proof to justify going to the jury on that issue.

The trial court's instruction was clearly proper under the language of this Court's decisions in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 720 (1944), *White Motor Co.* v. *United States*, 372 U.S. 253, 260 (1963), *United States* v. *Sealy, Inc.*, 388 U.S. 350, 357-58 (1967) and *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375-76 (1967). As the majority in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) pointed out:

> Most important was the jury's rejection of the allegation that the location restrictions were part of a larger scheme to fix prices.

[9] Interestingly, Monsanto points out that the appellate court distinguished other decisions where the plaintiff *"failed to allege"* a per se violation (Pet. at A-11 n.9), but it neglects to mention that the court also distinguished in the same footnote a case where the plaintiff *failed to prove* the conspiracy. *See* App. at A-13 n.6.

433 U.S. at 41 n.49. Moreover, the Seventh Circuit's holding regarding this instruction comports with other appellate and district court decisions considering such ancillary restrictions pursuant to a price-fixing conspiracy. *See, e.g., Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 827 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147, 1153 (7th Cir. 1978); *Blankenship* v. *Hearst Corp.*, 519 F.2d 418, 424 (9th Cir. 1975); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934, 942-48 (5th Cir. 1975);[10] *Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119, 130 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *Pitchford Scientific Instr. Corp.* v. *Pepi, Inc.*, 435 F.Supp. 685, 689 (W.D. Pa. 1977), *aff'd. mem.*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Interphoto Corp.* v. *Minolta Corp.*, 295 F.Supp. 711, 720 n.4 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969); *R. E. Spriggs Co., Inc.* v. *Adolph Coors Co.*, 1979-2 Trade Cases ¶ 62,764 at 78,396 (Cal.App.Ct.), *cert. denied*, 444 U.S. 1076 (1980).

Apparently recognizing that it cannot conceal its waiver or distinguish all of the above precedent, Monsanto now concocts its "mere incantation" or "base allegation" strawman. *See* Pet. at 5, 11 *et seq.* In order to pursue this argument, however, Monsanto must take the Seventh Circuit's language totally out of context and ignore completely the procedural posture of the issue before that court. Such a contortion is hardly persuasive.

That attempt failing, Monsanto inopportunely changes its theory and now argues to this Court that "[i]n contrast

[10] In *GTE Sylvania, Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980, 992 n.18 (9th Cir. 1976), the Ninth Circuit distinguished *Copper Liquor* as dealing with "territorial restraints . . . utilized to effect vertical price fixing—a clear *per se* violation by whatever means it is achieved."

to those cases where non-price restrictions were condemned as ancillary to price-fixing, there is no evidence in this case that Monsanto's programs and policies were adopted or employed with the intent or effect of fixing resale prices." Pet. at 17. The jury obviously disagreed, and the Seventh Circuit, after reviewing the entire record, affirmed the jury's finding.[11] In any event, this Court should not conduct another factual review.

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[11] Monsanto again stoops to twisting the record. An example is Monsanto's claim that its products were, "virtually without exception," in ample supply. Pet. at 17-18 n.20. This claim is refuted by Monsanto's own documents, a glaring instance being a Prospective Distributor Review prepared in 1969 by Thomas Dille, a Monsanto district manager:

> My greatest need is in northern Illinois [Spray-Rite's area], where we missed some sales this year because there was no product on the shelves.

PX. 279. Another Monsanto official described as follows the 1969 market for Monsanto's Lasso, its newest and most advanced product:

> [I]t was a new product which was *short*, there was a big demand for it, and we felt that we should be able to hold the price on that product . . . , stabilize the price at the market place.

Tr. 1929 (Emphasis added). Of course, this was somewhat academic to Spray-Rite, who, because of the boycott, was unable to obtain any Lasso in 1969. Tr. 793.

The most flagrant record distortion goes to the very heart of Monsanto's claim that there was no evidence linking Monsanto's programs and policies with the price-fixing conspiracy. Pet. at 16. Respondent will not burden the Court with a lengthy recital of the testimony and documents establishing this link for each program and policy, but will instead provide just a few examples regarding one such policy—Monsanto's areas of primary responsibility. Start with the testimony of Monsanto's Emmett McCormick, who stated that areas of primary responsibility were employed by Monsanto "to limit this competition amongst the distributors, and in turn, limit the price cutting . . . [and] stabilize the market." Tr. 1936-37.

III. PETITIONER'S POINT II, ALSO A BELATED REARGUMENT OF THE SUFFICIENCY OF THE EVIDENCE, DISREGARDS THE PER SE GROUP BOYCOTT, MISSTATES THE STANDARD APPLIED BY THE SEVENTH CIRCUIT AND DISTORTS THE TRIAL RECORD

Petitioner's Point II, another belated attempt at reargu-ing the sufficiency of the evidence, is without merit, since it totally disregards the per se group boycott, misstates the standard applied by the Seventh Circuit and distorts or ignores dispositive facts.

It cannot be over-emphasized that the per se group boycott in this case sets it apart from all of the cases relied upon by petitioner. Monsanto virtually admits that it conspired with its distributors to boycott Spray-Rite, and this admission is justified by the *uncontradicted* evidence.

(footnote continued)
Robert Schweikher, Monsanto's regional manager, told John Mulvehill of Midstate Chemical:

> And, really, John, it's all quite good for you. If you maintain the prices, and we don't get into a big price war out here with each other, if you have a profitable business, you are going to be happy and we're going to be happy. Now the way that is done by [sic] giving people certain pieces of geography to work in and to stay in. Now you play our ball game and we're going to get along just fine.

Tr. 320. McCormick likewise told Mulvehill: "We are trying to get a stable market, and the reason why we are limiting you to certain states is so we could stabilize the market." Tr. 1983. Finally, there is the classic statement by Albertson in forbidding Mulvehill to sell Spray-Rite (*see* p. 11, *supra*):

> No, don't make that sale. He's somebody [a price-cutter] that we don't want you to sell to. And besides he's out of your territory.

Tr. 292. Given such evidence, which is certainly more than a "mere incantation" or "bare allegation," it is not difficult to understand why the jury found as it did.

See pp. 10-12, *supra*. The boycott by Monsanto and Spray-Rite's competitors is precisely the pernicious conduct condemned in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). It does not promote interbrand or intrabrand competition, and its only purpose is to restrict competition. Even ignoring the overwhelming evidence of a resale price maintenance conspiracy, the boycott alone requires rejection of petitioner's Point II and denial of the writ.

Conceding the boycott in the hope of burying its undeniable evidence, Monsanto ignores the procedural history of the conspiracy question and proceeds along the following tortuous path: (1) the construction of a hypothetical summary of the evidence totally unrelated to the actual facts; (2) a distortion of the Seventh Circuit's holding; (3) an abstract exposition on free-riders; (4) an ever-changing claim of conflict in the circuits; and (5) a belated reargument of the facts.

The jury, in answering Special Interrogatory No. 1 which was requested and worded by Monsanto, specifically found that Spray-Rite was terminated "*pursuant to* a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto's herbicides."[12] Tr., Feb. 21, 1980, p. 2 (Emphasis added) The jury was extensively instructed regarding the conspiracy

[12] Monsanto did not object to the trial court's per se instruction regarding resale price maintenance (Tr. 4053), and it raises no question regarding it in the Petition. In *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court stated that its holding was limited to "non-price vertical restrictions" and noted that "[t]he per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." 433 U.S. at 51 n.18.

question and told that Spray-Rite had the burden of demonstrating "agreement," "mutual understanding," "knowing participation," and a "commitment" to "a common and unlawful plan."[13] Tr. 4349-53. The court of appeals, "[a]fter carefully reviewing the entire jury charge," held that "the instructions in this case were proper." App. at A-5.

The Seventh Circuit also held that "[t]here was sufficient evidence to support the jury's verdict that Monsanto terminated Spray-Rite *pursuant to* a conspiracy with other distributors to fix the resale price of Monsanto herbicides." App. at A-17 (Emphasis added). Stating that Spray-Rite was required to prove "termination *in response to* competing distributors' complaints about . . . [Spray-Rite's] pricing policies," the court found this burden satisfied and cited several examples of the conspiracy proof. *Id.* at A-16 (Emphasis added).[14] The Second Circuit's decision in *H. L.*

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[13] The trial court also gave the following instruction submitted by Monsanto:

> The fact that distributors complain about prices or anything else does not in itself mean that a conspiracy existed. Even if you find that Monsanto acted in exactly the way that complainants would have wished, that does not prove the existence of a conspiracy. . . .

Tr. 4354.

[14] The Seventh Circuit did not need to pass upon Spray-Rite's alternate theory and evidence of combination:

> Because we hold that Spray-Rite presented sufficient evidence to support the jury's verdict on its theory that Monsanto terminated the Spray-Rite distributorship pursuant to a resale price maintenance agreement between Monsanto and some of its distributors, we need not decide whether Spray-Rite presented evidence to support a verdict based on the theory that Monsanto effectuated its resale price maintenance scheme by coercing distributors into adhering to Monsanto's suggested resale price.

App. at 17 n. 9. Respondent's summary of the conspiracy evidence does not purport to include the extensive evidence of such coercion.

Moore Drug Exchange v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, 51 U.S.L.W. 3258 (U.S. Oct. 5, 1982) (No. 81-2215), was distinguished on the ground that "[t]he plaintiff [there] simply failed to adduce sufficient evidence of a conspiracy to terminate its distributorship." App. at 17 n.8. The only conspiracy evidence in *Moore* was "a price complaint from one distributor," while in this case "we have evidence of many complaints *coupled with* evidence refuting Monsanto's alleged independent business reason for terminating Spray-Rite." *Id.* (Emphasis added)

In devising Point II, Monsanto impermissibly isolates three[15] elements of the conspiracy evidence and argues that these three elements are not enough. Thus phrased, the issue is purely hypothetical, since the conspiracy evidence far exceeds complaints by competing distributors, Monsanto's concern over resale prices and Spray-Rite's termination. The record demonstrates not only those three elements, but also a pervasive, conspiratorial system of

[15] While the Petition isolates only *three* elements, Monsanto was a little more forthright in its main brief in the Seventh Circuit, where it admitted: (1) that "the [Monsanto] employees who decided not to renew Spray-Rite were aware of these [distributor] complaints" (Monsanto Br. at 50); (2) that it was concerned about the prices charged by its distributors (*id.* at 52); (3) that "[d]istrict sales managers and field salesmen were . . . aware of the price in the market and discussed resale prices with a number of distributors" (*id.*); (4) that Monsanto made "inquiries about price" (*id.* at 56); (5) that Monsanto made "occasional inquiries about Spray-Rite's prices" and sent Spray-Rite a suggested price list; and (6) that distributor John Mulvehill "testified he had been threatened with termination by Monsanto if he did not get his prices up. . . ." (*id.* at 55). Monsanto then cavalierly claimed that "even if those actions [inquiries about Spray-Rite's prices and sending it a price list] were taken *in response to* competitors' complaints, [they] are . . . not evidence of a conspiracy with other distributors." *Id.* at 52. (Emphasis added)

monitoring, investigation, policing, threats, coercion, and eventual termination. When coupled with what the Seventh Circuit describes as "evidence refuting Monsanto's alleged independent business reason for terminating Spray-Rite," this is the classic resale price maintenance scheme condemned in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960):

> The Sherman Act forbids combinations of traders to suppress competition. When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . , he has put together a combination in violation of the Sherman Act.

362 U.S. at 44. *Accord, Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

Monsanto again distorts the Seventh Circuit's opinion by claiming, for example, that it "ignored that a manufacturer legitimately may be concerned that distributor price-cutting will undermine its marketing strategy and unilaterally may terminate a price-cutter for that reason." Pet. at 22. Contrary to Monsanto's claim, the Seventh Circuit, citing *United States* v. *Colgate*, 250 U.S. 300 (1919), expressly recognized that "[a] manufacturer may unilaterally fix a suggested resale price for its product" and "may also lawfully refuse to deal with any distributor that resells the product at a price other than that it has suggested." App. at A-6. In any event, the issue is not whether the Seventh Circuit expressly considered every factual or legal claim raised by Monsanto, but whether the jury was properly instructed on the conspiracy question and whether there was evidence to support its finding. The Seventh Circuit considered that issue and affirmed. There is no need for further review by this Court.

Monsanto then advances an abstract discussion of the "free-rider problem." Pet. at 22-24,28. This discussion is totally in the abstract, since Monsanto cannot in good faith contend that Spray-Rite was in fact a free-rider. The record demonstrates beyond question that Spray-Rite provided extensive pre-sale, point-of-sale and post-sale services. *See* p. 4 *supra*. Spray-Rite was not a free-rider in any sense of that term, and the distributor complaints were about its prices and not its lack of service.

Monsanto claims that there is a conflict in the circuits regarding the conspiracy question, but it is unable to make up its mind regarding the participants in this alleged conflict. In its petition for rehearing before the Seventh Circuit, Monsanto argued that "[t]he Spray-Rite decision *stands alone*," that the panel here "misapplied" *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982), and that this decision conflicts with decisions from the Second, Third, *Eighth* and Ninth Circuits. Pet. for Rehearing at 1, 3, 5 (Emphasis added.) Monsanto now claims that the conflict is between the Seventh and Eighth Circuits on one side, and the First, Second, Third, Sixth and Ninth Circuits on the other. Pet. at 24-25. It glosses over the fact that the conspiracy evidence in this case, even excluding the boycott, meets and exceeds the standards enunciated by all these circuits. As the government declared in its amicus brief in *Battle*, "[t]he evidence adduced in *Spray-Rite* is easily distinguished from that adduced in *Battle*." Brief of the United States as Amicus Curiae on Rehearing En Banc at 7 n.6.

Finally, Monsanto makes a last-ditch attempt[16] at rearguing the "important . . . evidence" which the Seventh Circuit allegedly ignored and concludes Point II with the declaration that "[t]he issue before the Seventh Circuit was . . . whether the conspiracy issue should have gone to the jury at all." Pet. at 26-28. The Seventh Circuit decided that issue, and Monsanto has certainly had its day in court.

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[16] Monsanto's belated reargument is peppered with the usual record distortions. It claims, for example, that the "market [is] characterized by vigorous interbrand . . . competition." Pet. at 28. This statement flies in the face of its own "Business Plan" which declares that the market consists of "compounds which are the patented property of a handful of large companies" and which recognizes "[t]he proprietary nature of these compounds and their varying levels of activity and selectivity. . . ." PX. 139. Such a market is hardly a hotbed of interbrand competition.

A second instance is Monsanto's claim that "the final price complaint about respondent occurred more than one year before its non-renewal." Pet. at 27. Monsanto glosses over district manager Bone's visit six months prior to termination during which he asked about Spray-Rite's price to Meiers, Inc. on Ramrod 20-G and flatly threatened that if Spray-Rite did not follow Monsanto's suggested prices, "retaliation was going to take place." *See* p.8, *supra*. Monsanto carried out that threat at the next opportunity.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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COMMENTS REGARDING THE GOVERNMENT'S AMICUS BRIEF

On December 29, 1982, the government first informed respondent that it was filing an amicus brief in this matter, and respondent's counsel of record received that brief on January 4, 1983. There is, therefore, no time or necessity to respond in detail to the government's brief, which does nothing more than mouth Monsanto's platitudes and record distortions.

Nonetheless, respondent has the following brief comments regarding this rather unusual document:

1. Like Monsanto, the government would have the Court ignore the uncontradicted evidence of a conspiratorial boycott ("we will not discuss that issue here"). Amicus Br. at 5 n.5. That evidence, of course, distinguishes this case from all the cases cited by the government.

2. The government notes that it filed an amicus brief in the *Battle* rehearing en banc before the Eighth Circuit, but it does not even attempt to explain its statements in that brief that *Battle* "contains no evidence of causality," and that "the evidence adduced in *Spray-Rite* is easily distinguished from that adduced in *Battle* . . . ." Br. at 7 n.6.

3. The government cites and relies extensively upon *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742 (1982). It neglects to mention that *Valley Liquors* was cited and discussed in this opinion and that the author of this opinion was also a member of the unanimous panel in *Valley Liquors*.

4. In footnote 15, the government virtually admits that it is not interested in the facts or jury findings in this case. Amicus Br. at 10 n.15. That disdain is apparent throughout the brief.

5. It takes the government almost 13 pages to state the real reason why it filed this brief—a challenge to over 70 years of this Court's precedent* holding vertical price-fixing or resale price maintenance per se illegal. Amicus Br. at 13. The present theoreticians of the Justice Department would rise above all that and debate their theories in a vacuum. Respondent suggests that if these zealots want to overturn this precedent and weaken the Sherman Act, they should petition the Congress, rather than file an amicus brief in the Court.

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* The government repeatedly discusses and relies upon *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), but it passes over the Court's statement that "[t]he per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." 433 U.S. at 51 n.18.